Date Issued: February 4, 1985 (AGO 85-8)

Requested by: Hugh P. Seaworth, Bismarck City Attorney

- QUESTION PRESENTED -

Whether an ordinance granting a cable television franchise and providing the terms and conditions of that franchise may be referred to the electors of the city.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that an ordinance granting a cable television franchise and providing the terms and conditions of that franchise may not be referred to the electors of the city.

- ANALYSIS -

North Dakota law specifically provides for the enactment of ordinances by cities so as to carry into effect those powers statutorily granted to such cities. N.D.C.C. section 40-05-01(1). One such statutory power granted to cities is the authority to grant franchises and privileges to persons, associations, or corporations. N.D.C.C. section 40-05-01(57). Such franchises granted by a city remain subject to the regulatory powers of the governing body. Id.

North Dakota law also provides authority for the referral of a city ordinance to the electors of that city upon the filing of a petition protesting that ordinance. This authority is found in N.D.C.C. section 40-12-08 which states, in part, as follows:

> An ordinance which has been adopted by the governing body of a municipality may be referred to the electors of the municipality by a petition protesting against such ordinance.

There are no North Dakota cases on the question of whether all ordinances enacted by a municipality are subject to the power of referral provided for in N.D.C.C. section 40-12-08. However, this question has occurred in other jurisdictions and has resulted in a generally accepted rule of law on the referral of municipal ordinances:

> Generally, an enactment originating a permanent law or laying down a rule of conduct or course of policy for the guidance of citizens or their officers or agents is purely legislative in character and referable, while an enactment which simply puts into execution previously declared policies or previously enacted laws is administrative or executive in character and not referable. 42 Am.Jur.2d., Initiative and Referendum section 12 (1969).

This general rule of law as to the limitations upon the power to initiate and refer municipal ordinances was acknowledged and incorporated in a prior Attorney General's Opinion which held that a zoning ordinance was an administrative act as opposed to a legislative act. Thus, a zoning ordinance was not subject to the referral process. 1981 N.D. Attorney General's Opinion 1.

The rule that only legislative, as opposed to executive/administrative, decisions are subject to the initiative and referendum has generally been justified both by the requirements of the efficient administration of government and by the separation of powers doctrine.

> A charter giving a small group of electors the right to demand a vote of the people upon every administrative act of the city council would place municipal government in a straight jacket and make it impossible for the city's officers to carry on the the public business." Housing Authority v. Superior Court 219 P.2d. 457, 461 (Cal. 1950).

* * *

> . . . the power of the electorate to enact legislation by the use of the initiative process is circumscribed by the same limitations as the legislative powers resting in the legislative body concerned." Mueller v. Brown 221 Cal. App.2d. 319, 324, 34 Cal. Rptr. 474, 477 (1963).

The crucial test for determining that which is legislative and that which is administrative is whether the ordinance was one making the law or one executing a law already in existence. 5 E. McQuillin, Municipal Corporations section 16.55, at 213-14 (3d. Rev. Ed. 1969); Monahan v. Funk 3 P.2d. 778 (Or. 1931). In Seaton v. Lackey 182 S.W.2d. 336 (Ky. 1944), the Kentucky Supreme Court had before it a case involving the granting of a bus franchise by a city. The granting of such a franchise was required by state law. The question was whether such an ordinance was referable to the electors of that city. The Court concluded that an ordinance which simply puts into execution previously declared policies or previously enacted laws by the legislative body in question or by a superior legislative body is administrative or executive in character and is not subject to the power of the referendum.

> Since such action is mandatory ›the granting of a franchise by the city governing body!, the adoption of such an ordinance does not lie within the legislative discretion of the board. It is purely administrative, in compliance with the direction of the General Assembly." Id. at 339.

In Convention, Etc. v. D.C. Bd. of Elec., Etc. 441 A.2d. 871 (D.C. App. 1981), the District of Columbia Court of Appeals considered the existing case law on the subject of the referral of city ordinances and the determinations of whether such ordinances were administrative or legislative in character. After reviewing all of the available case law, the court made the following observation:

> The clear pattern that emerges from the case law is that, where an entity entrusted with executive and/or administrative functions merely seeks to carry out a previously adopted legislative policy, it is improper to submit its purely administrative decisions to the electorate for their approval vis-a-vis the initiative or referendum. This has been particularly the case when the local administrative entity

> seeks to carry out responsibilities delegated to it by higher, or superior, authority . . . ." Id. at 875.

With respect to Bismarck City Ordinance No. 4025, the subject of the referral in question, it is clear that this ordinance is enacted pursuant to the legislative authority provided to the city governing body by Bismarck Ordinance No. 4013 and by the Cable Communications Policy Act of 1984, Pub. L. 48-549, 98 Stat. section 2779 (1984). Bismarck Ordinance No. 4025 was enacted to implement and execute the legislative policies and purposes declared by the city governing body, by Bismarck city Ordinance No. 4013, as well as the Congress of the United States, by the Cable Communications Policy Act of 1984, Supra in the granting of a cable television franchise. As Bismarck Ordinance No. 4025 simply implements and carries out the previously declared policies and laws of both the city governing body and the federal government, the ordinance is administrative in character and, as indicated by the available case law previously described, is not subject to the power of referendum.

The authority to initiate and refer municipal ordinances is one provided by the Legislative Assembly of the State of North Dakota. Should there be a desire to have the statutes amended so as to specifically provide for the initiative or referral of ordinances granting franchises, including those administrative in character, the Legislature would have to pass a statute specifically providing for such authority within N.D.C.C. Title 40.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

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